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**CREATOR'S-RIGHTS IN NEW ZEALAND -
DO WE COMPLY WITH THE BERNE
CONVENTION FOR THE PROTECTION OF
LITERARY AND ARTISTIC WORKS ?**

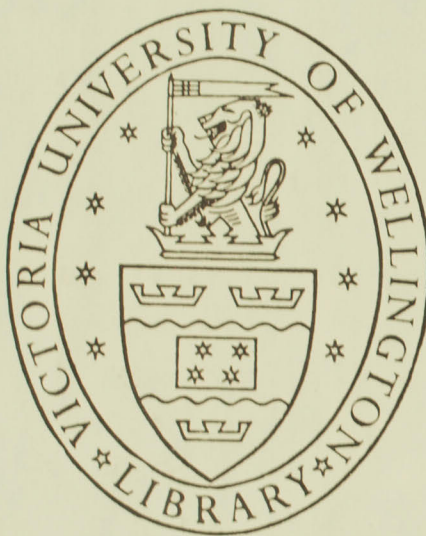
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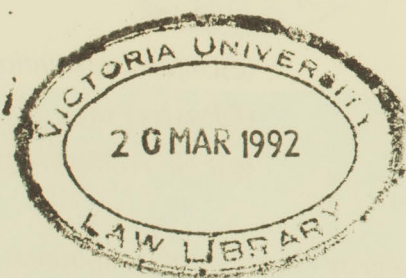
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A number of documents included were the specific creator's rights. These include the right of publication, the right of withdrawal of the work at any time, the right of paternity and the right of integrity.¹ The latter two rights gained international significance when article 6bis was added to the 1928 *Revised Berne Convention for the Protection of Literary and Artistic Works*.² The Berne Convention is the source of New Zealand's treaty obligations for creator's rights.³

¹ The term *author* will be used in this paper to refer to all creators of copyright work.

² C 19, 1109 (1928).

³ The publishers of the day, the publishers, "who came up to Parliament in the form of petitions with tears in their eyes, hopeless and worn, they brought with them their wives and children to invoke compassion and refused Parliament to give them statutory security." *Donaldson v. Becket* (1759) 2 Bro P.C. 129, 1 ER 532 at p843 per Lord Camden. See also Kaplan, *An Unfinished View of Copyright* (Columbia University Press 1964) Ch 1.

⁴ See S. Shapiro, "Current Theory on the Moral Rights of Authors and Artists Under French Law" (1968) 16 Am J Comp Law 463.

⁵ See the discussion of the classical moral rights doctrine and traditional examples in J. Maryson, "The Negligence of Bernard Buffet" (1978) 27 Mod L J 822 at p822.

⁶ The other major copyright convention, the Universal Copyright Convention 1952, which New Zealand acceded to at Wellington does not expressly contain author's rights. Full texts of both

It is not accidental that in New Zealand preference is given to the owner of the copyright at the expense of the author¹ of the work. New Zealand copyright law is a descendant of the United Kingdom's Statute of Anne² which has more than once been called an owner's statute, and not an authors' statute. This is largely due to the political and social climate which surrounded its enactment.³ Due to this history we have a statute focusing on the economic rights attaching to the work. There is, however another group of rights which attach themselves to a work - the *droit moral*, or moral rights. Moral rights evolved in Continental jurisprudence largely through judge made law.⁴ The doctrine of moral rights focuses on the unique relationship between authors and their works and serves to protect the personal rights of authors as distinct from their purely pecuniary rights which normally vest in a publisher or employer. The term moral rights is however somewhat of a misnomer as there is nothing particularly moral in the content of these rights, hence, the term moral as most would understand it is misleading. To curtail this practice, moral rights in this paper will be referred to as creator's-rights, a term which is more indicative of the nature and content of the rights.

A number of rights are included when one speaks of creator's-rights. These include: the right of publication; the right of withdrawal of the work at any time; the right of paternity and the right of integrity.⁵ The latter two rights gained international significance when article 6bis was added to the 1928 Rome Revision of the Berne Convention for the Protection of Literary and Artistic Works.⁶ The Berne Convention is the source of New Zealand's treaty obligations for creator's-rights.⁷

¹ The term author will be used in this paper to refer to all creators of copyright work.

² C 19. 1709 (GB).

³ The publishers of the day, the stationers; "Who came up to Parliament in the form of petitioners with tears in their eyes, hopeless and forlorn; they brought with them their wives and children to invite compassion and induced Parliament to give them statutory security." *Donaldson v Beckett* (1774) 2 Bro P C 129, 1 ER 837 at p843 per Lord Camden. See also Kaplan *An Unhurried View of Copyright* (Columbia University Press 1961) Ch 1.

⁴ See R Sarraute "Current Theory on the Moral Rights of Authors and Artists Under French Law" (1968) 16 Am J Comp Law 465.

⁵ See the discussion of the classical moral rights doctrine and traditional examples in J Merryman "The Refrigerator of Bernard Buffet" (1976) 27 Hast LJ 1023 at p1029.

⁶ The other major copyright convention, the Universal Copyright Convention 1952, which New Zealand acceded to at inception does not expressly mention creator's-rights. Full texts of both

The purpose of this paper is to examine New Zealand compliance with the obligations imposed by article 6bis. Article 6bis requires recognition of the right of paternity and the right of integrity. The nature and purposes of these two rights will be briefly canvassed. The consideration of protection of these two rights in accordance with the requirements of article 6bis will involve an examination of a diverse area of law, which will include: contract; copyright; the personal torts; defamation and the right of privacy, and the economic torts; unfair competition, passing off and the Fair Trading Act 1986. The reason such a wide area of law must be considered is because New Zealand has not codified the protection it offers to creator's-rights, due to the belief these areas of law provide the protection required by article 6bis. Where possible, New Zealand compliance with article 6bis will be highlighted using the topical film colourisation technique.⁸ It will be illustrated that the protection New Zealand currently provides does not satisfy the obligations imposed by article 6bis. The non compliance with the requirements of article 6bis appears of little consequence, in so far as the Berne Convention provides no disciplinary or enforcement procedures. However, it will be suggested that the inclusion of TRIPS⁹ in GATT¹⁰ could alter this, with the adoption of the 1971 Paris Revision as the appropriate international copyright standard. Article 6bis

conventions can be found in The United Nations, Educational, Scientific, and Cultural Organisation and World Intellectual Property Organisation, *Copyright Laws and Treaties of the World* Volume III (1990).

⁷ New Zealand has been bound by the Berne Convention since its inception in 1886 due to our relationship with the United Kingdom and then in our own right since 1928. The Berne Convention was originally signed in 1886 to prevent international piracy of works. Berne countries adhere to a principle of national treatment, which means that the authors of each contracting nation enjoy in other countries the same protection that country grants to their own authors. For more detailed commentary on the Berne Convention see S Ricketson *The Berne Convention for the Protection of Literary and Artistic Works 1886 - 1986* (The Law Book Co, Sydney, 1987).

⁸ This is the application of colour to old black and white films, which has come under substantial attack in the United States. In this paper the focus will be on the director as the primary creative force behind the work, (this theory was first articulated by French film critics writing in *Cahiers du Cinema*. See J Caughie *Theories of Authorship* (Routledge & Keegan Paul Ltd, London, 1981) B Belazs *Theory of the Film* (Dover Publication Inc, New York, 1970), which is still recognised by the current practice of granting academy awards to directors.) objecting to having their name and reputation associated with the altered work.

⁹ Trade Related Aspects of Intellectual Property. See further discussion below n 137 and accompanying text.

¹⁰ General Agreement on Tariffs and Trade, October 1947. 61 TIAS No 17000 UNTS 187. See below n 137 and accompanying text.

of the 1971 Paris Revision increases the protection required to be given to creator's-rights. Any accession by New Zealand to this later revision will involve alteration to the protection currently offered to creator's-rights. The paper will conclude by suggesting that New Zealand should enact creator's-rights legislation, not only in compliance with treaty obligations, but as a matter of policy, for New Zealand is a country proud of its cultural heritage and should provide some legislative protection for its' creators.

THE PURPOSE OF THE CREATOR'S-RIGHTS DOCTRINE

Before discussing compliance with article 6bis it is perhaps helpful to gain an insight into the role that creator's-rights serve. The doctrine focuses on the protection of the author's personality which is said to be inseparable from the work. As Vaver comments¹¹ "this metaphysical conception of moral rights, with its idealistic view of art and literature, may be useful as taxonomy but does not adequately explain the purpose of the doctrine." Vaver continues and identifies a number of the less metaphysical purposes of the doctrine.

(1)An economic basis, which he describes as a 'truth in marketing' legislation. The public are entitled to be told the truth about a work's authorship, and are entitled to have the work in the form that the author intended it. This, Vaver analogises to the functioning of a trademark. People rely on marks as the sign of a good brand or of a certain quality and are thus willing to pay more.¹² By acknowledging who created a work and by keeping it in its original form, he concludes "moral rights help to create and maintain a market in which consumer choice is more accurately channelled".¹³ This can be illustrated by *Leaf v International Galleries*¹⁴ where the representation that the work

11 D Vaver "Author's Moral Rights and the Copyright Law Review Committee's Report: W[H]ither Such Rights Now?" (1988) 14 Monash L Rev 284 at p286.

12 *Leaf v International Galleries* [1950] 2 KB 86 at p92.

13 Above n 11 at p288.

14 [1950] 2 KB 86, 92.

was a Constable went to the root of the contract and induced the plaintiff to buy the painting.

(2) The public interest in the functioning of a market place coincides with the author's own interest in gaining the reward the public are willing to confer by fame and fortune.¹⁵ The author should bear the risks of the marketplace, and be entitled to reap the benefits of their own labour. In cases where the work of an employee is credited to the employer, both the author, and the public miss out; the author on recognition, and the public on information from which they can make an informed choice.

(3) The bargaining power of creative people will be advanced. Without creator's-rights the author has nothing to bargain about.¹⁶ If granted creator's-rights by legislation it will encourage the judiciary to monitor waiver clauses for restraint of trade, unconscionability and undue influence.¹⁷

(4) The preservation of cultural heritage; "[M]onuments of human culture [are] an essential part of our common past. They tell us who we are and where we came from."¹⁸ If works are preserved accurately we can learn much of our past.

These four purposes enunciated by Vaver illustrate clearly the wider role creator's-rights play in the functioning of the creative market.

¹⁵ Above n 11 at p288.

¹⁶ Above n 11 at p289.

¹⁷ D Vaver "Author's Moral Rights - Reform Proposals in Canada: Charter or Barter of Rights for Creators?" (1988) 25 Osgoode Hall L Rev 749, at pp774-779 for criticism of the operation of these doctrines.

¹⁸ Above n 5 at p1895

II ARTICLE 6BIS OF THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS - 1928 ROME REVISION

Article 6bis prescribes the content and extent of protection required for creator's-rights to be accorded to authors of contracting states. Article 6bis of the Rome text of the Berne Convention provides:

- (1)Independently of the author's copyright, and even after the transfer of said copyright, the author shall have the right to claim authorship of the work, as well as the right to object to any distortion, mutilation or other modification of the said work which would be prejudicial to his honour or reputation.
- (2) The determination of the conditions under which these rights shall be exercised is reserved for the national legislature of the countries of the Union. The means of redress for safeguarding these rights shall be regulated by the legislation of the country where protection is claimed.

The obligations of article 6bis have generally been viewed as uncertain by the common law countries and the comment of the Whitford Committee is pertinent in that; "[W]hether our law has ever been fully satisfactory to meet our obligations depends on how we construe the obligations of article 6bis."¹⁹ However, some statements on the requirements of article 6bis can be made on the nature of the rights, the right of paternity, the right of integrity and the mode of protection required.

A. *The Rights Recognised by Article 6bis.*

1. *The nature of the rights*

The independence of creator's-rights from economic rights is made clear in paragraph (1). The exercise of these rights is not dependent upon the ownership of the economic rights in the work.²⁰ Under the classical doctrine, creator's-rights were inalienable. This was due to the personal nature of the rights which continues in article 6bis and is indicated by the wording of paragraph (1) which states; "...[P]rejudicial to *his* honour or reputation" (emphasis added). If the rights are personal at common law then the whole

¹⁹ Copyright and Design Law - Report to the Committee to Consider the Law on Copyright and Designs March Cmnd 6732 (1977), where they did recognise that moral rights should be included in British law, ss51-57. See comments in M Nimmer "Implications of the Prospective Revisions of the Berne Convention and the United States Copyright Law" (1967) 19 Stan L Rev 499 at p522.

²⁰ However it has been argued that paragraph(1) predicates the case where initially both rights vest in the author. Argument raised by D Vaver "Author's Moral Rights in Canada" (1983) 14 IIC 329 at pp353-354.

or partial assignment of these rights would be void due to the principles of champerty and maintenance.²¹ Yet, paragraph (1) does not expressly state whether the rights are inalienable, that is, despite what the author agrees to by contract when transferring economic rights, that the creator's-rights can be exercised afterwards. Under article 6bis(2) New Zealand is given the right to determine the conditions under which these rights may be exercised and the remedies available for their protection, yet this would not seem to include the right to change their character by making them alienable.²² Nimmer²³ claims that literally construed the provision means only that a translation of economic rights did not of itself transfer the creator's-rights, yet the materials cited by Nimmer in argument state only that creator's-rights can be regulated by agreement but not assigned or totally renounced. Two possible scenarios spring to mind. Firstly, if the contract says that the adapter can turn the particular novel into a play in any form which appears appropriate, the author of the work can object when the play is read. Conversely, if the author simply transfers the economic rights, then the creator's-rights will not also have been transferred unless the contract says so explicitly. The latter approach would seem preferable and is in accord with the interpretation of the French²⁴ and English²⁵ courts.

This view is supported when one examines the general report of the Rome Revision as it is stated that there was a general understanding that the rights spoken of under article 6bis should not be transferable or capable of relinquishment.²⁶ Vaver comments that despite

²¹ Above note 17 at p773.

²² Above n 17 p771.

²³ Above n 19 at p524.

²⁴ See discussion in: P Amarick, "American Recognition of the Moral Right - Issues and Options" (1979) 29 ASCAP Copy L Symp 31 at p47.

²⁵ *Frisby v British Broadcasting Corporation* [1967] Ch 932. The plaintiff was the author of a television play. A dispute arose over the inclusion of a particular line which the defendants believed would give offence and which the plaintiff believed was essential to the play. Interim relief was granted in favour of the plaintiff based on the construction of the contract between the two parties. The court placed reliance on *Joseph v National Magazine Co Ltd* [1959] Ch 14; [1958] 3 WLR 361; [1958] 3 All ER 52 that the courts will readily imply a term that no substantial alterations may be made to a signed article without the authors consent. There is a distinction between a license agreement where an alteration may be in breach of the license and a transfer of copyright where alterations can be made as long as they do not injure the reputation of the author. See also *Chaplin v Leslie v Frewn (Publishers) Ltd* [1967] Ch 932.

²⁶ General Report on the Rome Diplomatic Conference for the Revision of the Berne Convention E P Caselli reprinted in A Bogisch *The Berne Convention for the Protection of Literary and Artistic*

the failed attempts to make the rights inalienable at the 1948 Conference this does not change the position under the 1928 Revision and subsequent revisions of the Convention.²⁷ The nature of creator's-rights that the convention mandates suggests that assignments are implicitly prohibited and that while contracts regulating the exercise of creator's-rights for a particular transaction may be valid, states may be compelled to hold total waivers of such rights as void because they are incompatible with the policy of article 6bis.²⁸

2. *The right of paternity (the right to claim authorship).*

It is argued that the right of paternity comprises three subrights, these include: (1) The right to require that the author's work carry the author's name; (2) The right to prohibit the use of another's name in connection with the author's work; (3) The right to prohibit the use of the author's name in connection with a work the author did not create.²⁹ Nimmer comments³⁰ that an author has the right to claim authorship when the author has the ability to prevent others from being represented as the author of the work and may also prevent a false representation that he is the author of another person's work. Yet as Ricketson comments, paragraph(1) requires that a positive right to claim authorship be given, and that there was nothing in the reports on the Rome, Brussels or Stockholm conference to indicate otherwise.³¹

Works: From 1886 to 1986 (International Bureau of Intellectual Property, Geneva, 1986) at p171. It is permissible to look at such reports to interpret treaties due to art 32 of Vienna Convention of the Law of Treaties 1969 which although not strictly applicable, as it came into force after the 1928 Rome Revision, is said to enact customary treaty interpretation principles. As A McNair correctly comments '[T]here is no part of the law of treaties which [he] approaches with more trepidation than the question of interpretation' *Law of Treaties* (Clarendon, Oxford, 1961) at p364.

27 Above n 17 at p772.

28 Above note 17 at p772.

29 M Roeder "The Doctrine of Moral Rights - A Study in the Law of Artists, Authors and Creators" (1940) 53 Harv Law Rev 554 at pp561-562. In this paper the right of paternity will refer only to the positive right to claim authorship.

30 Above n 19 p522.

31 S Ricketson "Is Australia in Breach of its International Obligations with Respect to the Protection of Moral Rights" (1990) 17 Melb L Rev 462 at p473.

3. *The right of integrity (the right to object to any distortion, mutilation or other modification of the said work prejudicial to honour or reputation)*

This right refers to changes made to the work. Nimmer argues that the elements must be construed in such a way as to preclude some recoveries which a literal reading of article 6bis(1) would justify, citing the example that a literal construction would mean that an author could claim his rights are violated if someone who has purchased a copy of his book mutilates or destroys the copy.³² It appears that Nimmer may have misconstrued the paragraph as any such alteration to the work must be prejudicial to honour or reputation and it is unclear whether article 6bis covers destruction of the work.

The standard 'prejudicial to his honour or reputation' was regarded at the time of the 1928 Rome revision to be similar to the personal interests protected in the common law jurisdictions by the defamation action.³³ The phrase can thus be determined objectively, however it is open for states to interpret the phrase more subjectively.³⁴

It is unclear whether destruction of the work is covered by paragraph (1), likewise under the classical doctrine the status of destruction of a work was unclear. It would seem that destruction is a matter of policy to be decided by the individual signatory countries.

4. *The mode of protection.*

By paragraph (2) the mode of protection is a matter of the signatories discretion. New Zealand at present claims that the combination of legislation and common law actions adequately provide creator's-rights protection in compliance with article 6bis.³⁵

³² Above n 19 p522.

³³ Above note 31 p474

³⁴ See below in context of the right of integrity the discussion of the standard, also the judgement of O'Brien J in *Snow v The Eaton Centre* 1982 70 CPR (2d) 105 (Ont H Ct) where considerable weight was given to the author's own views of the infringement and testimony from the art community and members of the public.

³⁵ Canada pursuant to its perceived obligations under Berne (1928 Rome Revision) enacted moral rights provisions in its Copyright Act (RSC 1970) which has since been amended (RSC 1985). The United Kingdom in the rewrite of the Copyright Designs and Patents Act 1988 enacted specific moral rights legislation (Paris text 1971), in Australia the Copyright Review Committee in its "Report on Moral Rights" 1988 concluded by a majority of five to four that Australia

B. Preliminary Observations as to Compliance

Ricketson cites a number of preliminary observations when considering the question of Australian compliance with article 6bis which are equally applicable in the New Zealand context.³⁶ Briefly, they are as follows:

(1) As a matter of treaty interpretation the obligatory nature of the requirements of article 6bis are clear due to the unambiguous wording of article 6bis(1).

(2) The obligations exist in respect of foreign authors and works claiming protection in New Zealand pursuant to the convention.³⁷

(3) Treaty obligations in New Zealand need to be directly implemented into municipal law so that they can be invoked in court. In New Zealand this involves a consideration of a number of different areas of law.

(4) If New Zealand fails to comply with article 6bis the Rome text of Berne fails to provide a method of enforcement.

presently satisfied its moral rights obligations under Berne (Paris text 1971), a move criticised by D Vaver above n 11. The United States recently acceded to the Paris text of the Berne Convention without enacting any specific legislation relying on existing law has not gone uncriticised, see M Landau "Colourization, Copyright and Moral Rights, A United States Perspective" (1990) 5 IPJ 215 at pp242-244.

³⁶ Above n 31 p477 et seq. Australia too, claims that traditional forms of action ensure its compliance with art 6bis of the 1971 Paris Revision.

³⁷ The article does not mention the protection to be accorded to national authors. Yet as Ricketson points out it is difficult to imagine as situation where a national Parliament would decide to treat foreign authors and their works more favourably than that of their nationals, Above n 31 at p477.

C. Compliance With Article 6bis

New Zealand at present does not expressly recognise the doctrine of creator's-rights and relies on the protection offered by non specific legislation and common law actions to protect the right of paternity and the right of integrity. It will be seen that these do not provide the protection required by article 6bis.

1. The right of paternity (the right to claim authorship) - methods of compliance

(a) Contract

One of the major arguments raised against the introduction of creator's-rights legislation, is that they are a matter more appropriately left to contract. It is clear that one can bargain for the inclusion of almost any interest in a contract and that such will be enforceable by the courts unless illegal or contrary to public policy. However, the possibility of relying on contract as a means of creator's-rights protection to claim authorship in the context of black and white films and other works presupposes that the author is either the copyright owner or that there is a contractual relationship between the author and the copyright owner.

A number of problems exist in assessing the value of the work and of the creator's-rights. It is likely that any requests the author makes will reduce the value of the work to the publisher or producer as the room for exploitation of the work decreases. Authors new to the field are therefore vulnerable to exploitation and have a poor, if not, nonexistent bargaining position for the inclusion of creator's-rights in the contract, as not only is there little value in their names but the value of their works is uncertain. This may often lead to the waiver or assignment of the rights, despite the fact such is arguably inconsistent with the policy of Berne. Clearly, the well known author is in a much stronger bargaining position, as a publisher will want to use the author's name due to the reputation and sales brought with it.

(b) *The Copyright Act 1962*

Independent of copyright ownership is section 62 of the Copyright Act, which provides protection against false attribution of authorship.³⁸ This section is enforceable as a statutory duty³⁹ and is yet to be considered by a court in New Zealand. Section 62 is of limited scope as it does not apply to the makers of sound recordings, cinematographic films and television or sound broadcasts, thus cutting out protection for a large number of authors, also, despite section 62(1) which states that any reference to a work shall be taken to be a reference to a literary, dramatic, musical or artistic work, both subsections (4) and (6) refer explicitly to artistic works.

In the context of film colourisation there is a possibility of protection for the author. It is possible for a cinematographic film to claim protection under the categories of either dramatic or artistic works, as most black and white films pre date the Act and rely on the Copyright Act 1913 for protection.⁴⁰ Cinematograph films were first protected under the 1913 Copyright Act as dramatic works, or, alternatively cinematography was considered to be a form of photography, so films were able to have the same protection as photographs under the 1913 Act.⁴¹ These sections determine who the author of the work is and who can enforce the statutory duty.

Section 62(2) is aimed at the affixing of another's name on the work of which that person is not the author to imply that in fact that person is the author. The name must be affixed to the work and section 62(2) does not extend to the situation where the work, or reproductions of the work are otherwise passed off as being the work of a particular author by implication.⁴² In the case of film colourisation there is usually attribution to both the director of the black and white film and the artist who added colour to the film.

³⁸ See Appendix 1 for full text of section 62.

³⁹ Section 62(8).

⁴⁰ Clauses 14, 15 and 16 of the First Schedule Copyright Act 1962.

⁴¹ Section 3 of the 1913 Act gave copyright protection to "original, literary, dramatic, musical and artistic works". Section 2 defined artistic works as including photographs.

⁴² See later discussion in the context of section 62(4).

This practice is unlikely to breach the statutory duty as the information is quite accurate. The director's authorship is attributed to the original black and white film and the colouriser's authorship is attributed to the colourised film.

Section 62(4) applies only to artistic works and refers to the situation where a copyright work has been altered by a person other than the original author of the work and passed off as the work of the original author. This situation would typically arise where the author licences the making of an adaption and it is sold by the licensee as the author's unaltered work. Two early English cases considering section 7(4) of the Fine Arts Copyright Act 1862 (UK)⁴³ are of aid in the interpretation of section 62(4) due to the substantial similarity of content of the sections.

The first is *Preston v Rapheal Tuck & Sons*,⁴⁴ where an artist sold two titled drawings and the copyright to the defendant who reproduced the drawings and they were sold unaltered in the form of calendars under the name of the artist. Later the defendant cut off portions of the margin, made them oval or round, instead of square, changed the colour and pattern of the picture, altered the title and removed the artist's name. The claim for an injunction failed as it was held that the conditions of publishing or selling the altered work had to be such as to make a representation either expressly, or by necessary implication, that the work published or sold was the authors unaltered work. The fact that the artist's work was of a distinctive style and recognisable to a number of people did not enable it to fall within the subsection.

⁴³ Section 7(4) ... *Where the Author or maker of any painting, drawing or photograph, or negative of a photograph ... shall have sold or otherwise parted with possession of such a work, if any alteration shall afterwards be made therein by any other person, by addition or otherwise, no person shall be at liberty during the life of the author or maker of such works, without his consent, to make or knowingly sell or publish or offer for sale, such work or copies of such work so altered as aforesaid, or of any part thereof, as or for the unaltered work of such author or maker.*

⁴⁴ [1926] Ch 667.

The second case interpreting the section is *Carlton Illustrations v Coleman & Co Ltd*⁴⁵ in this case the artist made a fine line drawing which was signed by him for the defendants to use in an advertisement. The defendants enlarged and coloured the sketch, and copies of it with the artist's name were displayed in advertisement of the product. The defendants had also changed the face of the woman portrayed. The artist had not contemplated that the sketch would be coloured, stating that if he had, the picture would have been different. The artist received damages of 10*l.* and an undertaking in lieu of an injunction. The comment was made that for the work to come within the section the change must be a material one, which would effect the reputation of the author if it was held out to have been his unaltered work.⁴⁶ Ricketson comments that there is no justification for adding such a gloss, as all that is necessary on the plain reading of the section is for the work to have been sold as the authors unaltered work, adding this gloss places a greater burden on the plaintiff.⁴⁷

The view expressed by Ricketson was not considered in the recent Australian case *Crocker v Papunya Tula Artists Pty Ltd*⁴⁸ where the view expressed in *Carlton* was accepted by Morling J.⁴⁹ The changes made in the title of the work and the removal of the introduction were not material alterations, and the placement of the plaintiff's name on the frontispiece was not a representation that the defendant had published the work as the unaltered work of the plaintiff.⁵⁰ A further gloss was added in that Morling J suggested that a different view may have been reached had the work been a treatise rather than a catalogue as the reader may then assume that it is the author's unaltered work.⁵¹

45 [1911] 1 KB 771

46 Above n 45 p780 per Channel J.

47 S Ricketson *The Law of Intellectual Property* (The Law Book Co, Sydney, 1984) at para. [15.68].

48 (1985) 7 ATPR 40-582

49 Above n 48 at p46-720.

50 Above n 48 at p46-721 citing *Preston* at p674 per Tomlin J.

51 Above n 48 at p46-721.

In the context of film colourisation, the black and white film has been altered since it left the director, initially through editing and more recently by colourisation. Under the interpretation placed on alteration in *Carlton* the initial alteration would fail the 'material alteration, which would effect the author's reputation test' however it is arguable that colourisation may be such an alteration. On the second limb, is there a representation that the film is the unaltered work of the director? There is unlikely to be such a representation for two reasons; firstly, the commonly known industry practice of editing the film, and, secondly the film will be promoted as a colourised film, which clearly suggests that the work is altered.

Section 62(6) provides that in an artistic work in which copyright subsists, there cannot be dealings with a work as a reproduction made by the author, if to the knowledge of the other person, it is not a reproduction made by that author. The marketing of the colourised film, *The Asphalt Jungle* 'as directed by John Huston', by Turner's Entertainment Co would be conduct which would bring the section into operation. The colourised film is a reproduction of the original black and white film. The definition of reproduction is provided by section 2 as "including a version produced by converting the work into a three dimensional form or if three dimensional by converting it into a two dimensional form"(emphasis added). As Brown and Grant comment, the scope of the restricted act is left for the courts to determine on the facts.⁵² The additional fact that Turner's Entertainment Co knew that the reproduction was not made by the director, as they did the colourisation fulfils the knowledge requirement of section 62(6).⁵³ However if the film is marketed as; '*The Asphalt Jungle* as colourised by Turners Entertainment Co', there would be no breach of statutory duty.

⁵² A Brown, A Grant *The Law of Intellectual Property in New Zealand* (Butterworths, Wellington, 1989) at p359.

⁵³ See the discussion of the case in the wider creator's-rights context in M Landau above n 35 at pp 247-252.

There is no guidance provided as to the to be applied when assessing damages. In *Moore v The News of the World*,⁵⁴ a case considering the comparable United Kingdom provision, section 43 of the Copyright Act 1956, the plaintiff was entitled to something for having the annoyance and irritation of having somebody take the liberty of passing off a newspaper article as hers, and 100 pounds was not considered to be an excessive sum.⁵⁵ Thus some concern of the plaintiff's feelings will be taken into account.

It can be seen that section 62 is very limited in scope and operation. It does not operate to give authors the positive right to have their name associated with their work. Instead it protects authors against having another's name associated with their work and having their name associated with the work of others. In this respect section 62 does not comply with the requirements of paragraph(1) of article 6bis. Furthermore, the author's ability to claim false attribution of authorship does not extend to works held in private collections. In this situation a director or other author could not claim the protection of the section despite the fact that the work had in fact been falsely attributed. This would appear inconsistent with the policy of Berne, as no mention is made in article 6bis of the circumstances where the rights cease to exist, nor were there any such restrictions under the classical doctrine.

Positive attribution is required in two occasions under the Copyright Act, in criticism or review⁵⁶ and in the case of newspaper reporting.⁵⁷ These require sufficient acknowledgement to be given. Sufficient acknowledgement is defined in section 2 to mean:

[A]n acknowledgement of the work or other subject matter in question by its title or other description and, unless the work is anonymous or the author or maker has previously agreed that no acknowledgement of his name should be made, also identify the author or maker"

⁵⁴ [1972] 1 QB 441.

⁵⁵ Above n 54 at p450.

⁵⁶ Section 19(2).

⁵⁷ Section 19(3).

It is unfortunate and odd that the specified situations are so very limited, as if such a section was applied to all categories of creative works there would be compliance with the right to claim authorship mentioned in article 6bis.

(c) Defamation

An action for defamation⁵⁸ is not limited to aspersions made upon an individual's private character but also embraces disparagement of reputation in trades, professions or other offices.⁵⁹ If there is an attribution of an inferior work to the author, the author may well feel that their paternity interest has been damaged and may wish to use defamation for the protection of the personal interest one has in one's reputation. In *Ridge v English Illustrated Magazine*⁶⁰ a story was published in a magazine under the plaintiffs name when in fact the plaintiff was not the author. The reputation of the plaintiff in this case had been established for some time. The court found it difficult to say what harm had occurred but did recognise that it would effect the price paid to the author for his works and granted an award of damages.⁶¹

At present the law offers no right of retraction for the defamed person, which in the case of film directors would involve the removal of their name from the colourised version. Defamation does not provide a positive right to claim authorship and instead focuses on granting a remedy for the use of the name based on the standard of harm to reputation, this imposes additional requirements than those mandated by article 6bis.

⁵⁸ An action for defamation requires that: a defamatory statement have been made; that the statement was made about the plaintiff; that the statement was published. See S Todd (ed) *The Law of Torts in New Zealand* (The Law Book Co, Sydney, 1991) at pp682 et seq.

⁵⁹ J Fleming *The Law of Torts* 7th ed (The Law Book Co, Sydney, 1987) at p502.

⁶⁰ (1913) TLR 592

⁶¹ The availability of injunctive relief exists however not under the principles of *American Cyanimide Co Ethicon Ltd* [1975] AC 396, but instead under *Bonnard v Perryman*. [1891] 2 Ch 209. It would appear that an interim injunction will not be granted if there is any doubt that the words are not defamatory. However the High Court have awarded a number of interim injunctions.

(d) *Invasion of privacy*⁶² - *the right of publicity*

The right of publicity evolved from Prosser's fourth category of privacy⁶³ and now encompasses commercial damage to the business value of a person's identity.⁶⁴ The effect of the appropriation of personality decisions is to recognise or create an exclusive right in the individual plaintiff of a species of tradename in his or her own name and a kind of trademark in his or her likeness.⁶⁵ The action stems from the proprietary interest that one has in one's identity. The action recognises this interest and protects it from economic exploitation. Hence an author could seek to prevent the unauthorised use of their name or likeness in connection with a work not created by them, or, a work subsequently altered, as a violation of a right of publicity. The limiting factor is that the author must show damage or the likelihood of damage, this suggests that an author will need a commercially saleable reputation and the action will not therefore be available to those just beginning their literary and artistic careers.

⁶² The evolution of the right of privacy began with the article written by S Warren & L Brandeis "The Right to Privacy" (1890) 4 Harv L Rev 193. According to D Prosser "Privacy" (1960) 48 Cal L Rev 383,389 there are four categories comprising the law of privacy: (1) intrusion upon the seclusion, solitude or private affairs of another person; (2) public disclosure of embarrassing facts concerning another person; (3) publicity which places another person in a false light in the public eye and (4) appropriation of another's name or likeness for personal gain. This fourth category is commonly referred to as a right of publicity. Of relevance in the moral rights context are category (3) false light privacy and (4) appropriation of personality.

⁶³ Above n 62.

⁶⁴ The trend in the United States is to recognise such as an assignable and descending property right. It would seem that the director could argue that the use of his or her name in the advertising of the colourised film is an appropriation of personality. A separate action in exists in both the United States and Canada. In *Athans v Canadian Adventure Camps Ltd* [1977] 80 DLR (3d) 583 use of a well known print of the plaintiff was used as the basis of a sketch used to advertise the camps. Citing *Krouse v Chrysler Ltd et al* 40 DLR (3d) 15 the Canadian court moved from defamation to a broadly based common law tort. While in the United States a large body of law is increasing (see G Armstrong "The Reification of a Celebrity - Persona as Property" (1991) 51 Lous L Rev 443). In the recent case of *Midler v Ford Motor Co* 849 F 2d 460 (9th Cir 1988) where the defendants were sued for the unauthorised use of Midler's voice the courts recognised that what the defendants had appropriated was not theirs and had committed a tort in California.

⁶⁵ Problematic is that generally those who have participated in the creation of a work generally grant rights for the use of their names and personal features in connection with the exhibition and promotion of the work which effectively prohibits such an action. See C Wagner "Motion Pictures, Authenticity and the Elusive Moral Right" (1989) 64 NYUL Rev 628 at p675 in the context of the colourisation debate.

Although categorised by Prosser as a fourth right of privacy, Burrows⁶⁶ argues that it is really a protection of a right of property and its infringement will often amount to commercial exploitation akin to the tort of passing off and indeed it has been covered by such.⁶⁷ there is also the possibility of an action under section 9⁶⁸ and 13⁶⁹ of the Fair Trading Act 1986⁷⁰ and defamation.⁷¹

⁶⁶ Above n 59 at p756. P Keeton (ed) *Prosser & Keeton on Torts* (5ed, West Publishing Co, Minnesota, 1984) at p854 comments that it is pointless to dispute over whether or not such a right is to be classified as property as it is at least clearly proprietary in nature as once something has been protected by the law it is a right of value upon which a plaintiff can capitalise by selling licences.

⁶⁷ The Australian case of *Henderson v Radio Corporation Pty Ltd* (1960) SR 9 NSW 576 is often cited as the beginnings of this new tort. In this case two professional ball room dancers sought an injunction to restrain the defendant from distributing and selling a record couple on which the two were pictured in a dancing pose. The defendant argued that there was no common field of activity - recording and dancing were different fields and that no damage had been suffered to justify an injunction. These arguments were rejected and the injunction was granted. The court held that the re did not need to be a common field of activity, that it was enough that defendant had used the plaintiffs identity and reputation to sell his products. Damage was recognised based on the recognition that a person's reputation or identity has a commercially high value (at 595 per Evatt CJ and Myers J, at 603 per Manning J). However since that time the Australian Courts have instead stretched the action of passing off to cover appropriation of personality rather than moving to create a new tort.

⁶⁸ Section 9 provides: "No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive"

⁶⁹ Section 13(f) provides: "No person shall, in trade, in connection with the supply or possible supply of goods or services or with the promotion by any means of the supply or use of goods or services - Falsely represent that goods or services have any sponsorship, approval, endorsement, or affiliation."

⁷⁰ A number of Australian cases under the corresponding s 52 of the Trade Practices Act 1974 have recognised appropriation of personality. In *10th Cantanae Pty Ltd v Shoshana Pty Ltd* (1988) ATPR 40-83 the court would not limit the application of ss 52 and 53 so as to exclude from their ambit those "appropriation" cases where a party, without authority appropriates for commercial gain the reputation of another person. It was felt that the law should guard against consumers being misled by a false representation as to an association between goods and services and a respected identity. See also *Honey v Australian Airline* (1989)14 IPR 185, *Olivia Newton-John v Scholl-Plough (Australia) Ltd* (1986) ATPR 40-697, *INXS v South Sea Bubble Co Pty Ltd* (1986) ATPR 40-667. *Nostac Enterprises Pty Ltd v New Concept Import Services Pty Ltd* (1981) ATPR 40-235 and *Hutchence v South Sea Bubble Company Ltd* (1986) 64 ALR 330 also considered the Australian equivalent to s 13: s 53(c).

⁷¹ See *Tolley v Fry* (1931) AC 333 where a remedy was granted to an amateur golfer who was caricatured in an advertisement of the defendants chocolate. The excellence of the chocolate was likened to the excellence of the plaintiffs drive. The defendant alleged that the advertisement was libellous. It is relatively clear that there is nothing defamatory about someone liking a particular brand of chocolate, however, Tolley alleged a latent meaning which would injure his reputation as an amateur golfer. It would seem that the basis of the decision is that a person who lives by their public image have had something taken away from them an misappropriated. Fleming (above n 59 at p576) suggests that *Tolley v Fry* has potentially far reaching implications and could be stretched as a basis for restraining the unauthorised use of anyone's name or picture for commercial purposes under the guise of protection of reputation. (citations omitted) However at first instance Greer J commented; "unless a man's photo caricature or name is published in such a context that the publication can be said to be defamatory within the law of libel it cannot be made the subject matter of complaint by action at law, ([1930] 1 KB 467) Such comment would appear to be a clear rejection of tortious liability for appropriation of personality unless the elements of defamation are also satisfied.

Pannam⁷² argued in the 1960's that it was open for Australian Courts to recognise the existence of a property right in each individual for the exploitation of identity. If the individual does not wish to use it, then this choice should be protected by the ability to restrain unauthorised appropriation and to recover damages. If the individual does so choose, the manner of exploitation should be within control. Clearly such a right should be protected, it is just whether under a separate tort or under stretched categories of existing actions. The recent moves in Australia seem to indicate the latter path of action is being followed, this is likely to occur in New Zealand due to the wide interpretation taken of section 9 of the Fair Trading Act 1986.

Again the is action is aimed at preventing someone from using your name as an object of economic value rather than asserting the right to be named. This is emphasised by the remedy of damages which is aimed at replacing what has been lost by the use of the name in the particular context.⁷³

(e) *Unfair competition* ⁷⁴

Authors may prohibit the use of another's name in connection with the work under the tort of unfair competition. There is as yet no tort of unfair competition in New Zealand, although the possibility of one developing should not be dismissed.⁷⁵ As Ricketson⁷⁶

⁷² C Pannam "Unauthorised Use of Names or Photographs in Australia" (1966) 40 ALJ 4 at pp12-13.

⁷³ Above n 64 discussion in *Athans* per Henry J.

⁷⁴ The common law doctrine of unfair competition developed in the United States as an effort to curb fraudulent and deceptive trade practices and to promote fair dealing in the market place. Courts use the doctrine to prohibit a wide range of commercial practices including misappropriation, trademark infringement, false representation, false advertising and any other conduct which the court feels violates fair and honest conduct. Mc Carthy *Trademarks and Unfair Competition* (2ed 1984) pp14-16.

⁷⁵ R Hammond ("The Law and Ideas" Legal Research Foundation No 30 (1989) p18.) argues that New Zealand courts would not recognise a separate tort of unfair competition, not only because of the width of section 9 of the Fair Trading Act 1986 but due to the emphatic rejection of the High Court of Australia to unfair competition as an independent tort in *Moorgate Tobacco Co v Phillip Morris (No 2)* ((1985) 59 ALJR 77). (Later in "The Legal Protection of Ideas" (1991) 29 Osgoode Hall LJ 94 at p115 n64 Hammond comments that the issue has not been fully resolved in New Zealand.) Prior to this decision there had been in existence a line of authority emanating from the New South Wales courts suggesting that there was room in Australian jurisprudence for such a

comments, although there are protections available for nearly all situations, under a number of different headings, there is not one comprehensive law to cover misappropriation of the intangible results of one's competitor's skill and labour.

To recover for unfair competition the author must have lost revenues, business reputation or have suffered other economic injury. In the United States both the common law action and section 43(a) Lanham Act⁷⁷ protect the right to prevent false attribution of a work. Protection is available if a name is omitted and another is submitted. The essence of unfair competition in this context can best be illustrated by *Smith v Montoro*⁷⁸ where the court refused to dismiss a claim brought under the Lanham Act for the improper removal of an actor's name and the substitution of another's name in film credits and advertising. The plaintiff successfully argued that substitution of another's name deprived him of benefits that follow from recognition as a performer.⁷⁹ The director of a colourised film marketed as 'colourised by Turners Entertainment Co' could argue by analogy the loss of benefits from having their name omitted. However it is likely that the

concept. (*Hexagon v ABC* ((1975) 7 ALR 233). In *Moorgate Deane J* states that the rejection of unfair competition does not mean a denial of the desirability of adopting a flexible approach to traditional forms of action when such an approach is necessary to adapt them to meet new circumstances and situations. This approach has been mentioned in New Zealand (*McBean's Orchids (Aust) Pty Ltd v Mc Beans Orchids Ltd* (1982) 1 NZIPR 406) however it is submitted that New Zealand Courts should examine further the comment made by Lord Diplock in *Ervin Warnink v Townend & Son* [1979] AC 731 at p743 that the increasing recognition by Parliament of the need for more rigorous standards of commercial honesty should be a factor considered by a judge

76 S Ricketson "Reaping Without Sowing: Unfair Competition and Intellectual Property Rights in Anglo Australian Law " (1984) UNSW L Rev 1 at p30. He believes that the "sole requirement for protection should simply be that the plaintiff has expended time, skill and labour in the creation of some intangible business value. The one precondition being that in so doing has obtained for himself an actual or potential advantage or has placed the plaintiff at an actual or potential disadvantage".

77 A Cook "The Colourisation of Black and White Films: An Example of the Lack of Substantive Protection for Artists in the USA" (1988) 63 Notre Dame L: Rev 309 at p314. The Lanham Act section 43(a) 15 USC s 1125(a) provides: "Any person who shall affix, apply, or annex, or use in connection with any goods or service, a false description of origin, or any false description or representation ... and shall cause such goods to enter into commerce ... shall be liable to a civil action by any person ... who believes that he is or is likely to be damaged by the use of any such false description or representation". *Smith v Montoro* 648 F 2d 602 at 605 (9th Cir 1981). A film distributor removed an actors name from credits and advertising material was held actionable under the Lanham Act. *Yameta Co v Capitol Records Inc* 279 F Supp 582 (SDNY) 586-7 reversed on other grounds 393 F 2d 91 (2d Cir 1968) where use of the plaintiffs name in such a way as to overstate his contribution to the record was actionable.

78 648 F 2d 602 (9th Cir 1981).

79 Above n 78 at p603.

director's name will appear somewhere on the film credits and if not still in the industry it is difficult to see what economic loss could be attributed to the advertising method.

Unfair Competition does not provide a right to have a name associated with a work, a successful action is dependent upon economic loss, and this is not a requirement of article 6bis.

(f) *Passing off*

An action for traditional passing off⁸⁰ would arise in the situation where a publisher/production company publishes the work of an unknown author/director 'A' under the name of a well known author/director 'B'. A passing off suit would be brought by 'B'.

Well known authors can prevent their names from being used on works not executed by them. In *Archibald v Sweet* 'A' the author of a law book sold the copyright to 'B'. 'B' subsequently published a third edition of the work which was edited by a third party. A number of errors were contained in the edition. There is an analogy with the director of a colourised film. Lord Tenterden CJ commented in *Archibald v Sweet* :

The class of cases most like the present are those of the perfumers and fish sauce makers, where one has sold an article made by himself, professing that it was of the manufacture of the plaintiff. The first case of its kind was that of a perfumer. There, the injury was the deteriorating credit of the plaintiff's commodity; and here, it is the injury to the reputation of the author.⁸¹

This action does not provide a right to claim authorship. It provides a remedy in the situation where there has been economic loss due to false application of a name in an incorrect context.

⁸⁰ See *Ervin Warnink* above n 75 at 742, Lord Diplock's requirements for the action:

(1) A misrepresentation;
(2) Made by a trader in the course of trade;
(3) To prospective customers or ultimate consumers;
(4) Which is calculated to injure the business or goodwill of another trader (in the sense that this is a reasonably foreseeable consequence);
(5) Which causes actual damage to a business or goodwill of a trader by whom the action is brought or will probably do so.

⁸¹ (1832) 5 C & P 219; 172 ER 947 at p949.

(g) *Fair Trading Act 1986*

There has been in New Zealand a marked reluctance to read down the words of section 9 of the Act.⁸² The trend with the similar Australian provision, section 52 of the Trade Practices Act 1974, is that it is being applied in an ever widening range of circumstances. Section 9 provides protection analogous to that provided under passing off.

There have been no cases under section 9 in New Zealand relevant to this area, however there have been some in Australia.⁸³ In *Crocker v Papunya*,⁸⁴ which is the most illustrative case in the context of the right of paternity, the plaintiff argued that the description of him as the editor of the work on the frontispiece of the catalogue was conduct proscribed by section 52(1). Here a second catalogue was produced out of a first which was created by the plaintiff. The title of the second work was altered and the introduction to the work was removed. It was found that due to the close correspondence between the contents of the two catalogues, the second could properly be described as the second edition of its predecessor.⁸⁵ The omission of the introduction was not of such significance as to make it misleading or deceptive to describe the plaintiff as the editor of the work. The court held that just because he was accredited as editor it did not mean that he was responsible for all of the contents, drawing an analogy with a newspaper editor.⁸⁶ It is arguable by analogy the same argument will apply to a director, due to the well known practice of editing films and that the colourisation of a film, complete with the director's name is not conduct proscribed by section 9.

⁸² *Taylor Brothers Ltd v Taylors Textile Services (Auck) Ltd* (1988) 2 NZLR 1 at p39.

⁸³ Note above discussion on appropriation of personality in the context of s 52 of the Trade Practices Act.

⁸⁴ Above n 48.

⁸⁵ Above n 48 at 46-719.

⁸⁶ Above n 48 at p46-720.

The Court in *Crocker* suggested that a note 'based on previous work' would have been appropriate, to clear up any confusion.⁸⁷ In this context United States courts have held that such a note does not indicate that the author contributed to the work in question.⁸⁸ This raises the interesting issue, that, if at the beginning of the film there was a legend disassociating the director with the film and noting the criticism expressed, then depending on its ability to be seen and understood it may be acceptable and avoid a section 9 action.⁸⁹ Disclaimers may avoid a cause of action and satisfy notions of fair trading yet do little to provide protection for creator's rights especially in the context of the right of integrity.⁹⁰

In the situation where another's name is placed on the work and the author claims under section 9, there is a possibility under section 42 of the Act, that upon application by the Commerce Commission the court may make an order to disclose certain information or publish a particular advertisement. This is the closest the economic torts come to establishing a right to claim authorship.

Section 9 has a number of benefits over the other actions previously discussed, the author does not need to have an established reputation, there is no requirement of the same field of trading activity, the representation does not have to be made to potential customers, nor does damage need to be reasonably foreseeable. Despite all of these factors section 9 does not aid an author in a claim to have their name associated with the work in accordance with article 6bis.

⁸⁷ Above n 48 at p 46-720.

⁸⁸ *Geisal v Poynter Products Inc* 295 F Supp 331,353 (SDNY 1968).

⁸⁹ Above n 52 at paras 3.49 and 7.21

⁹⁰ See Landau above n 35 at p251 citing *Huston* p15 The court required the following legend to be attached to the film; "In respect for the memory of John Huston, screen play writer and director of this film made in 1950 in black and white, his heirs oppose the projection in France of this colourised version created in 1986" The court also required that viewers be instructed that they had the ability not to watch the film in colour by using the colour control knob on all televisions.

2. Protection of the right of integrity - methods of compliance

(a) Contract

The law of contract may provide a measure of protection to the right of integrity. Arrangements would need to be made between the author of the work and the purchaser of the work as to permissible alterations. Under the classical doctrine, creator's-rights are personal, and not proprietary rights, if the right to restrain alterations that injure the author's reputation are waived, the waiver may be ineffectual and illegal. This would appear to be the situation under article 6bis.

Contracts between authors and publishers and author's and employees often reserve rights in the latter to make alterations to the work. Illustrative is the following clause:

Subject to Employee's right to make the Director's cut, Employer shall have the sole and exclusive right to determine the final cut of all versions of the photoplay without any restriction whatsoever.⁹¹

Such clauses are arguably inconsistent with Berne, yet, in the absence of guidance as to the status of creator's-rights, courts in New Zealand will be placed in a difficulty when faced with a challenge to one of these clauses.⁹² Once given recognition the traditional doctrines of undue influence, unconscionability and restraint of trade gather more meaning.⁹³

Until such time it is relevant to consider whether the director is the copyright owner and whether there has been an assignment or a licence of the rights. Where no term regarding alterations has been expressly bargained for, as in the case of a right to colourise the film,

⁹¹ M Silfen *Counselling Clients in the Entertainment Industry 1980* (Practising Law Institute, New York, 1982) Vol 1 at p687.

⁹² Above n 17 at p773.

⁹³ Yet as Vaver comments above note 17 at p778 that the result of restraint of trade is an unenforceable de futuro contract instead of void ab initio. If the copyright has been transferred the copyright can continue to be held unless the contract as a whole can be shown that it should be rescinded for unconscionability. See for example *O'Sullivan v Management Agency & Music Ltd* [1984] 3 WLR 448,456. The problem is that often the defendant to such a suit has a deeper pocket than the author and can afford to appeal continuously.

it is relevant to consider whether there has been an assignment or licensing of the rights in the work. An assignee is the full owner of the right assigned and may deal with the work as absolute owner, whereas a licence is often a personal right which cannot be transferred and furthermore a licensee may not always be entitled to make alterations to the work⁹⁴ In the absence of any express or implied prohibition a licensee has the right to make alterations but not of a substantial nature.⁹⁵ It would appear that there is a right to make alterations as long as the reputation of the author is not injured.⁹⁶

There are two major problems with reliance on contract. The first is where there is no contractual limitation copyright owners may do as they like with a particular work. This may include the painting of spots on works of art to match the decor in a home, the removal of a tail on a painting of a circus horse and the alteration of fine line sketches into garishly coloured jig saw puzzles complete with the author's name and the stamp made in Korea.⁹⁷ The second problem occurs when the copyright expires, although the contracting parties are still bound, the third party is not, and could alter the work in any way.

Much of the protection contract offers the author is dependent upon the author owning the copyright in the work. If the author does, by appropriate contractual stipulation it is possible to control the use made of the work.⁹⁸ The rights in article 6bis are independent of economic rights and are not therefore adequately protected by contract.

⁹⁴ *Frisby v British Broadcasting Corporation* above n 25, it is however difficult to extract guidance from the cases, *Messanger v British Broadcasting Corporation Ltd* [1929] AC 151, *Loew's v Little* [1958] 1 Ch 650 cf *Re Clinical Obstetrics* [1905-10] MCC 176, *Sampson Low & Co v Duckworths* [1923-28] MCC 204.

⁹⁵ *Frisby* (above n 25) See also *Joseph* (above n 25) where the plaintiff was an expert on jade who wrote an article for *The Connoisseur*. The editor sent the article to a freelance journalist to improve on the style. The plaintiff objected to the new edition on the ground that it contained many errors of fact and the altered title and text detracted from the theme and he refused to allow the article to appear either with or without his name attached. The plaintiff was not bound to submit to having his name published as the author of a different style and his refusal did not amount to a repudiation of the contract.

⁹⁶ Above n 81.

⁹⁷ Examples from Australian Council paper on 'Moral Rights and the Arts' (Sydney, 1984) p1.

⁹⁸ Above n 47 at p 429 para 15.74.

(b) *The Copyright Act 1962*

The question can be raised will a distortion, mutilation or other derogatory treatment of the work be an infringement of copyright? The answer can be illustrated using the film colourisation. Initially it is relevant to decide what copyright category a particular film falls, that is; cinematographic films, artistic or dramatic works, in order to determine what acts constitute infringement and who is the copyright owner.

(i) *Cinematographic films*

If the film is a cinematographic film under the Copyright Act 1962 the maker of the film is the copyright owner and by definition is unlikely to include the director, despite being an author of the film.⁹⁹ The relevant provisions are sections 14(4)¹⁰⁰ and (8)¹⁰¹. Section 14(8) refers to the maker as being the person by whom all of the arrangements have been made. This is a role which traditionally falls to the producer. Section 14(4) serves to vest copyright in the employer of a person employed under a contract of service or apprenticeship, this will vest copyright in the production studio unless there is an agreement to the contrary¹⁰².

⁹⁹ It is unclear even under Berne who is the author of a cinematographic work. Article 15(1) provides "In order that the authors of works protected by the present convention shall, in the absence of proof to the contrary, be considered as such, and be consequently admitted to institute proceedings against pirates before the courts of the various countries of the Union, it will be sufficient that their names be indicated on the work in the according manner." On its face art 15 (1) would include as authors the director, producer, screen maker and anyone else who appears as the maker of the film. In France the rights of the director are defined in Art 14 para 2 of the Act of 11 March 1957 (as amended by the 1985 Act) as the co author of the film. A Bertrand "International Copyright: Will Droit Moral Seem Amoral in the USA. [1989] 7 EIPR 247,250.

¹⁰⁰ Section 14(4) provides: *subject to the provisions of this Act, the maker of a cinematograph film shall be entitled to any copyright subsisting in the film by virtue of this section: Provided that where a person commissions the making of a film and pays or agrees to pay for it in money or money's worth, and the film is made pursuant of that commission, that person, in the absence of any agreement to the contrary, shall, ... be entitled to any copyright subsisting in the film by virtue of this section.*

¹⁰¹ Section 14(8) provides: *For the purposes of this Act the maker of a cinematograph film is the person by whom the arrangements necessary for making the film are undertaken.*

¹⁰² H Laddie, Prescott P, Vitoria M *The Modern Law of Copyright* (Butterworths, London, 1980) at para 7.11 p274, comments that many directors were not under contracts of service but under contracts for service (the distinction discussed at 6.13 et seq) so that copyright did not pass automatically to the production company by whom they were engaged. Much will depend on the construction of the contract.

Only by contractual specification will copyright be held by the director. The infringing acts in respect to a cinematograph film are specified in section 14(5).¹⁰³ The colourisation of the film involves the following copyright steps: A copy of the film is made, the frames are then coloured by the use of a computer programme. Colour is inserted through the person or the computer programme running itself and applying chromience and colour directly to the work and producing the resulting cinematograph film.¹⁰⁴ This action involves the making of a copy of the film which is specified as an infringing act under section 14(5)(a).

(ii) *Artistic works*

If protection is claimed under photographs by virtue of the Copyright Act 1913 the copyright owner is provided by section 8(a) of that Act:

Where in the case of an ... photograph, the ...original was ordered by some other person, and was made pursuant to valuable consideration in pursuance of that order, then in absence of any agreement to the contrary, the person by whom the plate or other original was ordered shall be the first owner of the copyright.

In other cases section 27 provides:

...[T]he making of the original negatives from which the photograph was directly or indirectly derived; and the person who was the owner of such negative at the time when such negative was made shall be deemed to be the author of the work, ...

These provisions effectively ensure that the production company is the owner of the copyright in films.

¹⁰³ Section 14(5) provides: *The acts restricted by the copyright in a cinematograph film are-*
 (a) *Making a copy of the film;*
 (b) *Causing the film, in so far as it consists of visual images, to be seen in public, or in so far as it consists of sounds, to be heard in public;*
 (c) *Broadcasting the film;*
 (d) *Causing the film to be transmitted to subscribers to a diffusion service.*

¹⁰⁴ R Drurie "Colourisation of Films" (1988) 10 EIPR 37 at p 39.

By virtue of clause 16 of the First Schedule of the Copyright Act 1962 section 7(4) describes the acts restricted by copyright in an artistic work which is a photograph.¹⁰⁵ The colourisation of a film would be an infringement of copyright under section 7(4)(a) as a reproduction¹⁰⁶ of the work in a material form.

(iii) *Dramatic works*

There appears to be no definition under the Copyright Act 1913 of who is the author of a film treated as a dramatic work. It is arguable that as a director is almost always responsible for the way a film is shot, and would therefore be providing the film with an original character, that the director is the author of the film.¹⁰⁷ In such a case the director would be the first copyright owner unless the film was made in the course of employment.

Would colourisation be an infringement if the film was claiming protection as a dramatic work? The provisions of the Copyright Act 1962 have effect in relation to the film as if it had been an original dramatic work within the meaning of the 1962 Act.¹⁰⁸

The infringing acts are substantially similar to those in relation to artistic works and are specified in section 7(3).¹⁰⁹ Again the work would be an infringement as a reproduction

¹⁰⁵ Section 7(4) provides: *The acts restricted by the copyright in an artistic work are -*

(a) *Reproducing the work in any material form:*

(b) *Publishing the work:*

(c) *Including the work in a television broadcast:*

(d) *Causing a programme which includes the work to be transmitted to subscribers to a diffusion service.*

¹⁰⁶ Above n 52 and accompanying text for the definition of reproduction.

¹⁰⁷ It is also arguable that the script writer contributes just as much character and thus the possibility of joint authors ~~thus~~ arises.

¹⁰⁸ Clause 15, First Schedule Copyright Act 1962.

¹⁰⁹ Section 7(3) provides: *The acts restricted by the copyright in a literary, dramatic or musical work are-*

(a) *Reproducing the work in any material form:*

(b) *Publishing the work:*

(c) *Performing the work in public:*

(d) *Broadcasting the work:*

(e) *Causing the work to be transmitted to subscribers to a diffusion service:*

(f) *Making any adaption of the work:*

in any material form. In both cases of artistic works and dramatic works the film is likely to be shown to the public by the colourisers and will infringe copyright more than once.

The provisions of the Act regarding copyright infringement do not protect the author's right of integrity as required by article 6bis. All actions of infringement must be brought by the copyright owner, thus any protection obtained is dependent upon the ownership of economic rights while under Berne the rights are clearly independent.¹¹⁰

There is also a possibility of obtaining copyright in the distorted or mutilated work. Although Berne does not prevent such, it does seem to be a breach of the policy behind creator's-rights and article 6bis to allow copyright protection of such a work.¹¹¹ The situation may of course be different where the author allows or approves of the work. This scenario is unlikely to exist as it is a matter for the copyright owner to decide whether to contest the new work as an infringement of their copyright and the author's opinion will generally be of little influence.

(c) Defamation

An action for defamation is available to protect the right of integrity. This is because an action for defamation protects the person from that which impairs reputation in the community. This could arise when the work is published or displayed publicly and the author believes that their integrity has been affected.

(g) Doing, in relation to an adaption of the work, any of the acts specified in relation to the work in paragraphs (a) to (e) of this subsection.

¹¹⁰ It is interesting to note that the Australian Copyright Act 1968 s 35(5) provides that where an author of certain types of works may veto the use of the work for a purpose different from that originally contemplated, and s 55(2) the compulsory recording licence in respect of adaptations of musical works does not apply in respect of an adaption which debases the work.

¹¹¹ In the United States copyright protection has been given to the colourised versions of black and white films since June 22 1987. 52 Fed Reg 23 443 - 23446 (1987). See the discussion in M Landau above n 35, for an United Kingdom view see R Drurie above n 103.

In *Archibald v Sweet*¹¹² where 'A's copyright in a work was sold to 'B' and 'B' published a third edition of the work which was edited by another but not said to be so which publishers would suppose to be the work of 'A'. 'A' had a reputation and the errors contained in the third edition were such as to detract from that reputation.¹¹³ Also illustrative is *Lee v Gibbings*¹¹⁴ where a book was published as a smaller second edition and the court accepted that such could detract from the authors reputation as a scholar and author. Cornish comments:

Defamation, however concerns personal reputation and there may be matters of artistic or professional integrity which it would be difficult to persuade a court went to personal reputation. The record of common law defamation shows the occasional case where an author has succeeded in defamation against another who has made incursions and adaptations which can be said to cheapen the author's personal reputation. But it can never be easy to succeed in litigation of this type.¹¹⁵

However, when one considers the comment made by Fleming who rejects the standard of the 'right thinking person' in favour of the standard of 'a substantial and reasonable group in the community',¹¹⁶ which could easily be an artistic group, the concerns expressed by Cornish pale.

Damages for defamation are usually compensatory, hurt to feelings is compensated as well as damage to reputation in the strict sense.¹¹⁷ However, it must be noted that the difficulty of drawing a line between what should and should not be tolerated by an author is a difficult line to draw and opinions may not coincide.¹¹⁸ Although protection of the author's work, honour and integrity is a by product of an action which seeks to protect the author's public image from harm the action for defamation does provide some

112 Above n 81.

113 Above n 81 at p 950.

114 (1892) 67 LT 263 (Ch D).

115 W Cornish "Moral Rights Under the 1988 Act" (1989) 12 EIPR 449 at p450.

116 Above n 59 at p503.

117 *Fielding v Variety Incorporated* [1967] 2 QB 841 (CA), *Smith v John Fairfax & Sons Pty Ltd* (1987) 86 FLR 843, *Urren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, 151 per Windeyer J.

118 Fleming above n 59 at p573.

protection for the right of integrity as expressed in article 6bis. However, an action for defamation will be of little use if the author of the work altered is unidentified.

(d) *False light privacy*¹¹⁹

False light privacy protects the plaintiff from another party's presentation of a work that would reflect badly on the plaintiff or injure the plaintiff's reputation.¹²⁰ Although originating in English jurisprudence when Lord Byron succeeded in preventing the circulation of a bad poem which had been attributed him, the action has not been really recognised since then in Commonwealth jurisprudence.¹²¹ The false light need not be a defamatory light,¹²² however it often is, which perhaps explains why Burrows¹²³ argues that such is not about privacy at all, and is purely about protection of reputation and will in New Zealand almost always be covered by the tort of defamation. False light privacy, however, protects the individual's right to be free from mental distress caused by misleading public exposure. The plaintiff must show that the false representation was highly offensive to the reasonable person and that the defendant acted knowingly, or with reckless disregard as to the falsity of the publication.¹²⁴ The standard is so much higher than that of article 6bis which requires only that it be prejudicial to honour and reputation. It has also been suggested that those who seek publicity may waive their publicity claims which will remove protection for those well known authors.¹²⁵ This would appear to be the correct view when one considers the lack of reliance placed on the right in the United States in recent years.¹²⁶

119 Above n 61.

120 See generally H Wade "Defamation and the Right of Privacy" (1962) 15 Vand Law Rev 1093, Note (1962) 50 Cal L Rev 357.

121 *Lord Byron v Johnston* 1816 2 Mer 29, s5 ER 851, P Keeton above n 66 at p 864.

122 Zolich "Laudatory Invasion of Privacy" 1967 Clev Marsh L Rev 540.

123 Above n 66 at p756.

124 Wagner above n 65 at pp669-673.

125 Keeton above n 66 at p867.

126 See D Zimmerman "False Light Invasion of Privacy: The Light that Failed" (1989) 64 NYULR 364.

(e) *Unfair competition*

If recognised as a tort in New Zealand, a cause of action under unfair competition for protection of the right of integrity may arise in the situation where a licensee of the work changes the work to such an extent that an attribution to the author would deceive the public and put the author at an unfair economic disadvantage.¹²⁷

*Gillian v American Broadcasting Co*¹²⁸ is the most often cited American case in this context. In this case Monty Python sought an injunction to prevent ABC from showing an edited version of their show. Monty Python argued that the "editing done by ABC mutilated the original work and that consequently the broadcasting of those programs as the creation of Monty Python violated the Lanham Act..."¹²⁹ The court granted the injunction thus preventing future broadcasts. The court found that the edited version omitted essential elements of the story line and "impaired the integrity of appellants work and represented to the public as the production of the appellants what was actually a mere caricature of their talents."¹³⁰

Following the line of *Gillian* there is scope for the development of unfair competition however it is restricted as a plaintiff must establish economic injury. This is because the action is based on a right to exploit one's own property right, which once transferred, is lost, and with it the right to make a claim for unfair competition.¹³¹ The action suffers from restrictions that article 6bis does not impose and is not an action that is personal to the author independent of ownership.

127 Cook above n 77 at p319.

128 538 F 2d 14 (2d Cir 1976).

129 Above n 128 at p 24.

130 Above n 128 at p25.

131 Cook above n 78 at p 320.

(f) *Passing off*

Where a lesser work is passed off as the work of the author an action for passing off may lie. This action is dependent upon the author meeting the requirements of the action specified in *Ervin Warnink*.¹³² In the context of the right of integrity an author may well be offended by alterations to a work which may occasion no economic loss. In some cases the alterations may increase the sales of the work, colourisation is a good example of bringing almost forgotten works back into the public eye. The requirement of economic loss make passing off an unsuitable cause of action in the context of the right of integrity.

(g) *Fair Trading Act 1986*

For a successful action the author would have to show that the alterations to the work were such as to make it misleading or deceptive to the public for the author's name to be associated with the work. The problems the author faces in this context are well illustrated by *Crocker*¹³³ and indicate that in claiming protection for the right of integrity section 9 is not the appropriate action, as alterations which may offend an author's sensibilities may not be alterations which makes it false and misleading to have the author's name associated with the work.

3. *Summary of the methods of compliance*

The above discussion indicates that New Zealand authors do not have a right to claim authorship as required by paragraph (1) of article 6bis. An action for defamation brought by an author may satisfy the right of integrity. The major problem with relying on actions such as passing off, unfair competition and the Fair Trading Act is that they are all economically orientated, whereas although creator's rights have an economic perspective they cannot be adequately enforced by these causes of action. Contract, of

¹³² Above n 80.

¹³³ Above n 48, see above n 68 and 69 for a consideration of section 13(f) which faces similar difficulties to those under section 9.

itself does not provide protection unless the author has sufficient bargaining power, while the Copyright Act focuses predominantly on the rights of the copyright owner. A claim that these causes of action adequately protect the rights of paternity and integrity as required by article 6bis does not appreciate the nature of these rights and is completely inaccurate.

New Zealand is in clear breach of the obligations imposed by article 6bis. The fact that Canada after acceding to the 1928 Rome revision enacted specific creator's-rights legislation, the recent moves by the United Kingdom in enacting specific creator's-rights legislation after years of asserting that their common law provided adequate protection, and the fact that the recent "Report on Moral Rights" by the Australian Copyright Council which rejects the need for Australia to reform its law, claiming its common law protection is adequate, has come under substantial criticism¹³⁴ adds credibility to the claim that New Zealand is in breach of its obligations under article 6bis.

D. The Consequences of Non Compliance

The 1928 Rome Revision contains no sanctions for the non compliance of any member country.¹³⁵ There are however two possible consequences at an international level.¹³⁶ Firstly, New Zealand could be coerced into compliance under customary international law, due to a fundamental breach of a treaty obligation.¹³⁷ This is unlikely as it has occurred in no other instance. Secondly, through diplomatic or trade pressure, which although unlikely at present, due to the lack of trade or economic incentives could change due to the agreement in April 1989 by members of the General Agreement on Tariffs and Trade¹³⁸ (GATT) that further negotiations would include trade related aspects of

¹³⁴ "Report on Moral Rights" (Australian Government Printing Service, Canberra, 1988). Ricketson above n 31, Vaver above n 11.

¹³⁵ Note however art 33 of the 1971 Paris revision (introduced at 1968 Stockholm Revision) which provides for the reference of disputes concerning the interpretation to be referred to the International Court of Justice, yet there are no procedures for enforcement of the judgement of the court.

¹³⁶ Ricketson above n 31 at p482.

¹³⁷ Vienna Convention on Treaties 1960 art 60(2) and (3).

¹³⁸ October 30 1947. 61 TIAS No 17000 55 UNTS 187.

intellectual property (TRIPS) by December 1990. The implications for New Zealand is that a GATT resolution on TRIPS would require New Zealand compliance. Current suggestions indicate that the latest revision of the Berne Convention the 1971 Paris Revision, is the appropriate international copyright standard.¹³⁹ New Zealand with its current interest in GATT will not want to be viewed as lagging in its treaty obligations and could improve its standing by acceding to the 1971 Paris Revision and complying with the obligations that it places on member countries.

III THE CURRENT ARTICLE 6BIS

The status of creator's-rights has been reaffirmed at subsequent revisions¹⁴⁰ of the Berne Convention to which New Zealand was not a party, unlike Australia, the United Kingdom, Japan and the United States to cite a few. The most recent revision conference was in 1971 at Paris. Article 6bis now reads:

(1)Independently of the authors economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation.

(2)*The rights granted to the author in accordance with the preceding paragraph shall, after his death be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorised by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained.*

(3)The means of redress for safeguarding the rights granted by this article shall be governed by the legislation of the country where protection is claimed (emphasis added to alterations).

A. *The Changes to Article 6bis.*

The addition of "or other derogatory action" widens the scope of the right of integrity to include the way in which works are presented to the world and would therefore include an inaccurate retrospective exhibition of an artist's work and the publishing of a book in an offensive cover.

¹³⁹ See Mall "The Inclusion of Trade Related Intellectual Property Code Under the General Agreement of Trade and Tariffs" (1990) 30 Santa Clara L Rev 265, 267

¹⁴⁰ Brussels, Stockholm.

The minimum period for the protection of the rights has been extended to the term of copyright protection mandated by the Convention.¹⁴¹ Paragraph (2) is of some flexibility and allows a country to protect only one of the rights in paragraph (1). By not specifying who should maintain the rights for the period, article 6bis allows a country after the death of the author to refer protection of the rights to a specified body.

The contents of article 6bis have been reaffirmed and expanded. Creator's-rights are firmly a part of the Berne Convention. Clearly New Zealand law does not presently comply with the new article 6bis.

B. Should New Zealand Accede to the 1971 Paris Revision of the Berne Convention?

This question has wide implications for the whole of New Zealand's copyright law, however with the importance of the role of TRIPS in GATT and when one considers that reform of intellectual property law and more specifically copyright law has been mooted in New Zealand it may be the appropriate time for New Zealand accession to the 1971 Paris revision.

In 1985 the Law Reform Division of the Department of Justice released a discussion paper "Reform of the Copyright Act 1962". Unfortunately only brief mention was made of Berne and a still briefer mention of creator's-rights. In 1989 a further paper was released by the Department, "The Copyright Act 1962; Options for Reform" and again there was little mention of Berne and the topic of creator's-rights was classed as a subsidiary matter. However it was recognised that any reforms would have to have regard to New Zealand's international obligations. When one adds to this recognition New Zealand's current interest in GATT the possibility of accession and compliance is much stronger.

¹⁴¹ Article 7(1) which provides for a term of life and fifty years.

C. Paris Article 6bis: A Minimalist Approach or Comprehensive Reform?

The additions to article 6bis require alterations to New Zealand's domestic law to protect creator's rights. For minimum compliance New Zealand could enact a right to claim authorship for the term of copyright. This is more probable than the extension of the action of defamation after death, as despite support for allowing an action to be brought by close relatives in certain circumstances and recommendations for such, they are not given effect to in the Defamation Bill 1988.

Independent of New Zealand's accession to the 1971 Paris Revision it is the author's opinion that New Zealand should examine the policy rationale behind the doctrine and enact creator's-rights legislation as required under the 1928 Rome Revision, in support of the number of New Zealand authors, who at this time are unprotected. There needs to be recognition that these rights exist for something a little more than the ethereal, and that they have an important role to play in the functioning of the creative market.¹⁴² Once enacted creator's-rights will lose their uncertain status and have automatic standing in the eyes of the judiciary and public at large.

1. Creator's-rights legislation

There are a number of models available for New Zealand to follow and a number of different interests to consider.¹⁴³ Yet as Cornish acknowledges "...in Continental Europe, moral rights did not emerge in their full glory in a single triumphant burst. They were the product of an evolution..."¹⁴⁴ There are however some areas of importance which must be addressed.

¹⁴² See previous discussion in text accompanying n 11-18.

¹⁴³ Canadian Copyright Act, see for commentary; Vaver above n 17 and R Gibbens "The Moral Rights of Artists and the Copyright Act Amendment" (1989) 15 Can Bus LJ 441. The United Kingdom Copyright, Designs and Patents Act 1988, see W Cornish above n 115, S Glass "Moral Rights and the New Copyright Law" (1990) 34 SJ 6., Californian Art Preservation Act 1985, Artists Authorship Rights Act 1983 (New York), Massachusetts Moral Rights Statute 1985. E Damish "The New York Artist's Authorship Rights Act: A Comparative Critique" (1984) 84 Col L Rev 1733.

¹⁴⁴ Cornish above n 115 at p452.

(a) *Protection of whom?*

Authors of all works accorded copyright protection should be accorded creator's-rights. This will involve a redefinition of who is an author of a work with a focus on the creative input into a work. Authorship should not be lost through an employment contract.

In the case of joint authors guidance can be obtained from the French Copyright Act 1957, where, in article 14 a director is deemed to be a co author of a film along with the script writer, the author of the adaption and the author of the dialogue.¹⁴⁵ All authors should have the right to claim authorship and to prevent their integrity from being harmed.

(b) *Duration of protection*

The rights specified in article 6bis are personal to the author and should upon death become the responsibility of a public body to ensure the preservation of the work and protection of the author's rights. This provides the dual function of protecting the public interest in the preservation of cultural heritage. There already exists in New Zealand a substantial number of bodies whose statutory purpose is to preserve creative works.¹⁴⁶ These bodies should be specifically recognised under creator's-rights legislation and a number of standards regarding the preservation of the work and protection of the creator's-rights imposed.

¹⁴⁵ Above n 99 Bertrand A at p250. Further art 10 of the Act provides that in the case of disagreement between the authors the court will settle the dispute.

¹⁴⁶ The New Zealand Film Archives, a charitable trust established in 1985 which is a member of the FIAF (Federation Internationale des Archives du Film) acquires and preserves film to ensure public availability. The National Art Gallery, Museum and War Memorial Act 1972 s11(1)(b) lists as a function to act as the national repository for, and display of a large range of visual arts. The National Library Act 1965 imposes the function by s6(1)(a) to develop and maintain a national collection of library material relevant to New Zealand and its people, library material includes: books, films, paintings, etchings and photos. The Queen Elizabeth the Second Arts Council of New Zealand Act 1974 gives power to the Council (s10(2)(f)) to acquire, accept, any artwork and to deliver it for safekeeping to a number of specified bodies. The Antiquities Act 1975 is aimed at the protection of antiquities by controlling the method of sale and disposition.

(c) *Scope of works protected*

There are of course some works which attract copyright protection which are arguably not worthy of long term preservation, these include office memoranda, phone books and street directories. The preservation of these works could depend on the intention of the author as to the permanence of the work, and, in the case of works such as office memo could be dependent on adequate documentation for reconstruction. In considering creator's-rights the standard 'prejudicial to honour or reputation' would be utilised and satisfied in these cases, the destruction of an office memoranda is likely to have negligible effect on the reputation of the author. If the author feels particularly strongly about the specific work there should be provision made for reclamation of the work at their expense.

Although by no means specific, these considerations are important when considering the enactment of creator's-rights. Whatever is enacted and in whatever form it cannot help but lay a foundation for development. There needs to be a number of changes in the way New Zealand views its authors. As Cornish comments on the new creator's-rights provisions in the United Kingdom Copyright, Designs and Patents Act 1988:¹⁴⁷

Let us hope for one thing from the explicit adoption of moral rights *eo nomine* in English Law: that the significance of the root idea will begin to penetrate judicial attitudes, so as to lay a foundation for somewhat less meagre protection in future statutes.

And further:

While the new statutory provisions lay very considerable constraints on the operation of the new law, there also remains room to manoeuvre by the courts. They should strive to ensure that the less established and the less self possessed authors, artists and directors have a degree of aid in establishing norms of reasonable commercial behaviour among those who exploit their creations. The new provisions do not have to be treated as tokenism.

¹⁴⁷ Above n 115 at p452.

CONCLUSION

There is no possibility of an author obtaining full protection of creator's-rights as required under article 6bis of the 1928 Rome revision under current New Zealand law. This is an unfortunate circumstance as not only does it leave New Zealand in breach of a treaty obligation but it is a sad reflection on the treatment of authors in a country which values highly its cultural heritage. The historical economic bias of New Zealand's copyright laws is no excuse. The important role creator's-rights have must be acknowledged. It is to be hoped that discussion of these rights will be encouraged, and that information will be available in the forthcoming copyright reform to prevent New Zealanders from falling foul of the doggerel where Tom Brown said of his tutor: "I do not love thee Dr Fell/The reason why I cannot tell" to ensure that creator's-rights legislation will be enacted.

APPENDIX 1

Section 62 Copyright Act 1962

(1) The restrictions imposed by this section shall have effect in relation to literary, dramatic, musical or artistic works; and any reference in this section to a work shall be construed as a reference to such a work.

(2) A person (in this subsection referred to as "the offender") contravenes those restrictions as respects another person if, without the licence of that other person, he does any of the following acts in New Zealand, that is to say, he-

- (a) Inserts or affixes that other person's name in or on a work of which that person is not the author, or in or on a reproduction of such a work in such a way as to imply that the other person is the author of the work; or
- (b) Publishes, or sells or lets for hire, or by way of trade offers or exposes for sale or hire, or by way of trade exhibits in public, a work on which the other person's name has been so inserted or affixed, if to the offender's knowledge that person is not the author of the work; or
- (c) Does any of the acts mentioned in paragraph (b) of this subsection in relation to, or distributes, reproductions of a work, being reproductions in or on which the other person's name has been so inserted or affixed, if to the offender's knowledge that person is not the author of the work; or
- (d) Performs in public, or broadcasts, a work of which the other person is not the author, as being a work of which he is the author, if to the offender's knowledge that person is not the author of the work.

(3) Subsection (2) of this section shall apply where, contrary to the fact, a work is represented as being an adaptation of the work of another person as it applies where a work is so represented as being the work of another person.

(4) In the case of an artistic work which has been altered after the author parted with the possession of it, the said restrictions are contravened, in relation to the author, by a person who in New Zealand, without the licence of the author,-

- (a) Publishes, sells, or lets for hire or by way of trade offers or exposes for sale the work as so altered, as being the unaltered work of the author; or
- (b) Publishes, sells, or lets for hire, or by way of trade offers or exposes for sale or hire a reproduction of the work as so altered, as being a reproduction of the unaltered work of the author,-

if to his knowledge it is not the unaltered work, or, as the case may be, a reproduction of the unaltered work of the author.

(5) Subsections (2), (3), and (4) of this section shall apply with respect to anything done in relation to another person's work after that person's death, as if any reference to that person's licence were a reference to a licence given by him or by his personal representatives:

Provided that nothing in those subsections shall apply to anything done in relation to a person more than 20 years after that person's death.

(6) In the case of an artistic work in which copyright subsists, the said restrictions are also contravened, in relation to the author of the work, by a person who in New Zealand-

- (a) Publishes, or sells or lets for hire, or by way of trade offers or exposes for sale or hire, or by way of trade exhibits in public, a reproduction of the work, as being a reproduction made by the author of the work; or
- (b) Distributes reproductions of the work as being reproductions made by the author of the work,-

if (in any such case) the reproduction or reproductions was or were to his knowledge not made by the author.

(7) The preceding provisions of this section shall apply (with the necessary modifications) with respect to acts done in relation to 2 or more persons in connection with the same work.

(8) The restrictions imposed by this section shall not be enforceable by any criminal proceedings; but contravention of those restrictions, in relation to a person, shall be actionable at his suit, or, if he is dead at the suit of his personal representatives, as a breach of statutory duty.

(9) Any damages recovered under this section by personal representatives, in respect of a contravention committed in relation to a person after his death, shall devolve as part of his estate, as if the right of action had subsisted and had been vested in him immediately before his death.

(10) Nothing in this section shall derogate from any right of action or other remedy (whether civil or criminal)) in proceedings instituted otherwise than by virtue of this section:

Provided that this subsection shall not be construed as requiring any damages recovered by virtue of this section to be disregarded in assessing damages in any proceedings instituted otherwise than by virtue of this section arising out of the same transaction.

(11) In this section "name" includes initials or a monogram.

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